Levi Strauss & Co., Inc. *and* Southwest Regional Joint Board, Amalgamated Clothing & Textile Workers Union, AFL-CIO, Petitioner. Case 23-RC-4897

July 17, 1981

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 23 on May 21, 1980, an election by secret ballot was conducted on June 13, 1980, under his direction and supervision among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that there were approximately 514 eligible voters and that 469 ballots were cast, of which 181 were for the Petitioner, 280 were against, and 8 were challenged. The challenged ballots are not sufficient in number to affect the results of the election. Thereafter, the Petitioner timely filed objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director issued an order directing a hearing on the Petitioner's objections on July 14, 1980. Thereafter, on October 9, 1980, the Hearing Officer issued and duly served on the parties his report and recommendations to the Board on the Petitioner's objections. He recommended that each of the Petitioner's 44 objections be overruled and the results of the election certified. Thereafter, the Petitioner timely filed exceptions to the Hearing Officer's report.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its Corpus Christi, Texas, plant, including mechanics, janitors, packing and shipping employees, quality auditors, cutting room employees, material handlers and plant clerical employees, but excluding office clerical employees, instructors, professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the entire record in this proceeding, including the Petitioner's objections, the Hearing Officer's report, the Petitioner's exceptions and brief, and the Employer's brief, and hereby adopts the Hearing Officer's findings,[1] conclusions, and recommendations only to the extent consistent herewith.[2]

Objections 4 and 5 allege that Respondent instituted and discriminatorily enforced a "no-talking rule" during the final 24 hours of the election campaign. We find merit in the Petitioner's exceptions to the Hearing Officer's recommendation that these two objections be overruled.

On the evening of June 11, 1980,[3] Industrial Relations Representative Fred Herrera met with supervisors at the Employer's Corpus Christi, Texas, plant to inform them of restrictions to which they would be subject during the 24-hour period immediately preceding the June 13 election. He explained that in the final 24 hours of the election campaign the law prohibited management from talking to more than one employee at a time or holding any group meetings. According to Her-

[1] The Petitioner has excepted to certain credibility findings made by the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing the credibility resolutions in this case.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the Hearing Officer's recommendations that the Petitioner's Objections 6, 7, 8, 9, 21, 24, 26, 27, 28, 29, 31, 38, 39, 41, and 44 be overruled.

In adopting the Hearing Officer's recommendations that Objections 3, 14, and 16, and Objections 13, 15, 19, 22, 23, 30, 37, 42, and 43, should be overruled, Chairman Fanning finds it unnecessary to rely upon *Howard Manufacturing Company, Inc.*, 219 NLRB 638 (1975), a case in which he dissented.

The Hearing Officer recommended that the Petitioner's Objection 20 be overruled, but failed to state the basis for his recommendation. Employee Delma Maldonado testified that Supervisor Linda Borrego came by her work station on the day of the election and told her that the warning system would be eliminated and she could be fired right there if the Union came in. She also testified that Borrego told her nothing would change if the Union came in except that employees would have to pay union dues. The parties stipulated that, had Borrego been available to testify, she would have denied making these statements.

Assuming Borrego made the statement concerning elimination of the warning system, we nevertheless find it insufficient to overturn the election for the following reasons: (1) the remark was made by a low-level supervisor on the day of the election, thus leaving little time for it to circulate among the more than 500 employees who compose the unit; (2) Borrego, by Maldonado's own admission, also told her that if the Union came in nothing would change except that employees would have to pay union dues, thus, at best, leaving Maldonado with an ambiguous impression concerning what would happen if the Union won; and (3) the statement was made in a context free of any unlawful or objectionable conduct during a campaign of over 6 weeks.

Member Jenkins finds it unnecessary to resolve the issues raised by Objections 20.

[3] All dates herein are in 1980.

rera, he also told the supervisors to make sure employees stayed at their work stations during this period so production could get going again, but did not instruct them to prevent employees from talking. The following day, at noon, the Employer made an announcement over its public address system concerning the 24-hour rule that stated as follows:

> The law prohibits any group meetings between supervisors and employees from 12:00 noon today until the polls open at noon tomorrow. We ask your cooperation in this matter. . . .

The record establishes that, despite Herrera's alleged instructions, the supervisor did restrict employee talking. Several employees stated at the hearing that on the day of the election their supervisors sharply curtailed their freedom to converse with fellow employees. Those supervisors who testified in detail about this matter corroborated the employees' testimony. Supervisor Linda Bradley testified:

> I told them on that particular day, I would appreciate it if they would stay in their seats and not get up and wander around and meet with their neighbors because I could not meet more than on a one-to-one basis with anyone. So I wanted them to stay in their seats and do their job.

The Employer's counsel asked Bradley if she had been told why employees were not to gather into groups that day, and she replied, "Because the union activities were supposed to be over from that point." On cross-examination by the Petitioner, Bradley agreed that one of her concerns had been employees, both pro- and anti-union, talking about the union campaign.

Supervisor Gloria Garcia observed that, while the Employer's policy concerning employees talking and moving about was consistent throughout most of the campaign, it changed on the day of the election. "When the campaign was going on," Garcia testified, "everybody could associate with everybody. We didn't say anything because we didn't want to interfere with whatever they were doing, and all this." Garcia noted, however, that on election day management told supervisors to keep employees "quiet" and "in their seats," and that employees were allowed to talk that day, but not about the Union. Garcia further testified that management's explanation for not wanting employees to group up on the day of the election was that "it would be best" since "there were a lot of feelings."

Supervisor Mary Vera testified that she told her employees about "the 24 hour waiting period," and that they were not to walk around to other machines and talk to other operators. She also said she was told that employees were not to talk to each other because "[t]hey were already confused, and if they were talking to one another, it would get them more confused. And this way I could talk to them individually."

The Hearing Officer found that the Employer instituted a rule restricting employee talking, that the rule was applied to employees during working time while at their work stations, and that prior to noon on June 12 no such rule existed. He also noted that Respondent's stated reason for implementing this rule was "to get production going again," following almost 2 weeks of disruptions caused by the election campaign. In light of the Petitioner's failure to offer any evidence of the rule having been applied during nonworking time, the Hearing Officer concluded that legitimate business considerations, not antiunion ones, dictated its promulgation and enforcement. Accordingly, he recommended that these objections be overruled, citing *Stone & Webster Engineering Corporation*, 220 NLRB 905 (1975), in which the Board overruled an objection to the Employer's restricting on nonwork-related conversations during working hours in the weeks preceding the election.

Since the rule in this case was admittedly a product of the election campaign, the burden is therefore on the Employer to justify its imposition. We cannot agree with the Hearing Officer's finding that the Employer met that burden because it "asserted that the reason for the rule was 'to get production going again,'" and the Petitioner adduced no evidence to show that the rule was applied to nonworking time.

Contrary to the Hearing Officer, we find that the Employer improperly instituted a no-talking rule during the critical period. The record testimony reveals that conversations among employees were restricted during the final hours before the election for one of two reasons, either of which, standing alone, would be objectionable. With respect to the first, Industrial Relations Representative Herrera denied ever instructing supervisors to tell employees they were not to speak to each other. However, he did tell them not to meet with groups of employees within 25 hours of the election and to keep employees at their work stations working. Conceivably then, the no-talking rule did not originate from upper management, but from several supervisors' misinterpreting two separate instructions from management, neither of which was ostensibly designed to eliminate the prior practice of allowing talking during work. Assuming, *arguendo* , that this was the case, we cannot read a legitimate business

justification into a rule prohibiting working time conversations among employees for the 24 hours prior to the election simply because the supervisors incorrectly interpreted and applied the Employer's instructions. It is undisputed that employees were permitted to talk to each other while working prior to this time, including during the 6-week election campaign. The testimony further indicates that employees were released immediately after the election, and that the talking ban was not in effect after the election. We therefore are unable to discern any legitimate business consideration for prohibiting employee conversations during this 24-hour period.

In *Stone & Webster Engineering Corporation, supra*, the employer observed that employees were engaging in frequent conversations on working time in the weeks preceding the election. Concerned about decreased production, the employer instituted a somewhat more restrictive policy with respect to these conversations than it had followed in the past. Unless employees' conversations were work related, they were instructed to return to work. The employer's response, coming as it did several weeks before the election, was clearly justified by its interest in maintaining adequate levels of production throughout the course of the election campaign. In contrast, the Employer in the instant case allowed employees to engage freely in union-related discussions throughout virtually the entire preelection period, but abruptly cut off all non-work-related talking 24 hours before the election. Thus the timing of the Employer's actions here clearly do not evidence the same degree of concern over a falloff in production as did the employer's action in *Stone & Webster*.[4] Whatever interest the Employer here might have had in promoting production on the day of the election is negated by the release of the employees after the conclusion of the election.

The second possible explanation for the institution of the no-talking rule is that the Employer purposefully transmitted instructions to supervisors to give management a one-sided advantage in last-minute electioneering. As previously noted, Supervisor Vera testified that the Employer informed her that employees were not to talk to each other because they would become more confused, and because it would afford her the opportunity to talk to them individually, and Supervisor Garcia testified that management explained it did not want employees grouping up on the day of the election because "it would be best" since "there were a lot of feelings." Further, the record reveals several instances of supervisors engaging employees in union-related discussions on the day before, and the day of, the election. For example, employee Norma Hinojosa credibly testified that Supervisor Gary Dennis told her on June 13 that employees returning from sick leave or layoff would have to pay union dues.[5]

In light of the foregoing, we conclude that the Employer had no legitimate business justification for prohibiting employee conversations during the 24 hours prior to the election. This would be so whether the prohibition was a consequence of supervisors misinterpreting management's instructions or the Employer intentionally attempting to monopolize the final hours of the election campaign. Accordingly, we will sustain the Petitioner's Objections 4 and 5 and direct a second election.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[4] Chairman Fanning finds it unnecessary to distinguish *Stone & Webster*, a case in which he dissented on the point in issue.

[5] There is also evidence that the no-talking rule was discriminatorily enforced against union adherents. Employee Delma Maldonado testified that she asked her supervisor on the day of the election why she was letting an employee walk around, and the supervisor replied that the employee was "not talking Union."